Supreme Court, U. S.
FILED
AUG 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

File No. 75-187

ROBERT P. KELLY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT P. KELLY, Petitioner and Defendant-Appellee below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, entered on June 11, 1975, in the above entitled case.

REPORTS OF OPINIONS

Memorandum and Order, filed January 29, 1975, United State of America vs. Robert P. Kelly, No. 75-1121, United States District Court, District of Minnesota, Third Division (unreported);

Memorandum and Order, filed June 11, 1975, United States of America vs. Robert P. Kelly, No. 75-1121, United States Court of Appeals for the Eighth Circuit (unreported);

Order (denying petition for rehearing en banc), United States of America vs. Robert P. Kelly, filed July 2, 1975, No. 75-1121, United States Court of Appeals for the Eighth Circuit.

JURISDICTION OF SUPREME COURT

Judgment sought to be reviewed is the reversal of the District Court Order of January 29, 1975, by the Eighth Circuit Court of Appeals on June 11, 1975.

Rehearing denied July 2, 1975.

Statute conferring jurisdiction by certiorari—28 USC § 1251 (1) and Rule 22 of this Court.

QUESTION FOR REVIEW

1. Is a person whose prior state felony conviction has been "set aside", "nullified" and "purged" by a state administrative agency pursuant to a discretionary expungent statute, a "former felon" within the meaning of Title 18 USC, App. 1202 (a)(1)?

2. Is a person who has been officially notified that his prior state felony conviction has been "set aside", "nullified" and "purged" and told that his "records are sealed", been deprived of his right to 'fair warning' and 'notice' upon indictment for violation of 18 USC, App 1202 (a)(1) within the meaning of the due process clause of the 5th and 14th Amendments to the Constitution of the United States?

STATUTORY PROVISIONS INVOLVED

18 USC, App 1202 (a)(1)
18 USC, App 1203 (2)
MSA 242.31

STATEMENT OF THE CASE

Robert P. Kelly was indicted by United States Grand Jury on April 11, 1974, with a one count violation of 18 USC, App § 1202 (a)(1). The indictment charged possession of a firearm by a person who had been convicted of a felony (simple robbery) in the State of Minnesota, in violation of 18 USC, App 1202 (a)(1). Appended to this Petition is the brief Stipulation of Facts upon which the matter was submitted to the Court for trial. The Facts show that Robert P. Kelly received, upon discharge from the Minnesota State Reformatory for Men, an expungement of his conviction pursuant to MS 242.31. The state statute provided, and Mr. Kelly was informed by letter, that the state conviction was ordered set aside, nullified, and the record was "purged thereof" and that copies of the Order were sent to the Federal Bureau of Investigation. The United States District Court found Mr. Kelly not guilty and the Government appealed. The Eighth Circuit Court of Appeals reversed.

REASONS FOR ALLOWANCE OF THE WRIT

1. Conflict in the Circuits

A virtually identifical expungement statute of the State of Washington, *Wash. Rev. Code*, 9.95-240 has been construed by the Ninth Circuit Court of Appeals to exclude an individual as a 'former felon' from conviction of violation of federal firearm control statutes. *United States vs. Hoctor*, 487 F.2d 270 (9th Cir. 1973).

There is pending for decision, after argument en banc, the identical question in the Ninth Circuit Court of Appeals, *United States vs. Potts* (No. 74-1817) (argued March 1975, Ninth Circuit), which the District Court decided in favor of the Defendant.

The Seventh Circuit, *Thrall vs. Wolf*, 352 F.Supp. 1074 (E.D. Wisc) rev'd 503 F.2d 33 (7th Cir. 1974) has decided a similar question against the defendant on that case.

2. Importance of Question

Several of the States have restoration and expungement statutes similar to the Minnesota Statutes which express a Legislation policy of rehabilitation for youthful offenders. The federal government also has such a statute. The effect of such statutes of the firearms control law should be resolved by this Court.

3. Conflict With Decisions of This Court

The Court of Appeals in reversing the District Court in this case has departed from this Court's fundamental teachings regarding 'fair warning' or 'notice' to a criminal defendant. *Rewis vs. United States*, 401 US 808, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971).

The Court of Appeals in this case has also departed from this Court's view of construction of such statutes, *Jerome vs. United States*, 318 US 101, 87 L. Ed. 640, 63 S. Ct. 483 (1943) and of this statute in particular, *United States vs. Bass*, 404 US 336, 92 S. Ct. 515, 30 L. Ed. 2d 408 (1971).

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT P. KELLY,

Defendant.

3-74-Cr-55
MEMORANDUM & ORDER

ROBERT G. RENNER, United States Attorney, and JOSEPH T. WALBRAN, Assistant United States Attorney, Minneapolis, Minnesota, attorneys for plaintiff.

JOHN S. CONNOLLY, Connolly & Heffernan, St. Paul, Minnesota, attorney for defendant.

The issue for the Court on defendant's motion here to dismiss the indictment is whether a person is subject to indictment under 18 U.S.C. App. § 1202(a)(1)[1] for receipt of a firearm by one who has been previoualy convicted of a felony, when, prior to the date of the alleged offense, his prior felony conviction has been set aside and nullified pursuant to Minnesota's Youth Conservation Act, M.S.A. § 242.31.

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[1] § 1202. Receipt, possession, or transportation of firearms—Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Defendant is charged in an indictment under 18 U.S.C. App. § 1202 (a)(1) with receipt of a firearm by a felon, and the matter was tried to this Court upon stipulated facts. The facts as stipulated are that on August 31, 1970, defendant was convicted in Minnesota state district court of the crime of simple robbery, a felony. He was committed to the Youth Conservation Commission and sentenced to the Minnesota State Reformatory. On August 16, 1973, defendant was granted an order of discharge by the Minnesota Department of Corrections Youth Conservation Commission, pursuant to M.S.A. § 242.31. On March 1, 1974, defendant was arrested in possession of a firearm which he had received in and affecting commerce.

Defendant moves to dismiss the indictment on the grounds that his discharge under M.S.A. § 242.31 had the effect of nullifying and setting aside his previous conviction, and he has been purged and freed from all penalties and disabilities which would otherwise arise from that past conviction. The Government opposes defendant's motion, claiming that the order of discharge does not change the fact that defendant is a felon within the meaning of 18 U.S.C. App. § 1202(a)(1).

The Minnesota statute under which defendant was granted his discharge reads in pertinent part as follows:

§ 242.31 Restoration of civil rights

> Whenever a person committed to the commission upon conviction of a crime is discharged from its control . . . , such discharge shall, when so ordered by the commission, restore such person to all civil rights and *shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof.* The commission shall file a copy of the order with the district court of the

county in which the conviction occurred, whereupon *the court shall order the conviction set aside.*

. . .

Such orders restore the defendant to his civil rights and purge and free him from all penalties and disabilities arising from such conviction and it shall not thereafter be used against him, except in a criminal prosecution for a subsequent offense if otherwise admissible therein. M.S.A. § 242.31 (emphasis added).

The Government relies chiefly upon *United States v. Mostad*, 485 F.2d 199 (8th Cir. 1973). That case involved a defendant who had previously been convicted of a felony and who, prior to his indictment under § 1202(a)(1), had received a discharge under M.S.A. § 609.165. Pursuant to that Minnesota statute the defendant had been restored to "all civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place. . . ." M.S.A. § 609.165. Our court concluded that Mostad was still rightly considered a felon and was subject to the proscription of § 1202(a)(1). *United States v. Mostad*, Crim. No. 72-144 (D. Minn., filed Dec. 4, 1972), *aff'd*, 485 F.2d 199 (8th Cir. 1973).

However, the Minnesota statute involved in the *Mostad* case is substantially different from the statute under which defendant in this case was discharged. M.S.A. § 609.165 provides only for a restoration of civil rights. Section 242.31 of the Youth Conservation Act provides not only for a restoration of civil rights, but also for nullification of the prior conviction so that the defendant is purged and freed from all penalties and disabilities arising from such conviction. Most significant-

ly, under § 242.31 the defendant's previous conviction is actually set aside by court order.[2]

This distinction was noted by our court in the *Mostad* case:

> The Court feels that the language of that statute [609.165] makes it clear that the person to be restored shall have certain civil rights he would have had had he not been convicted of a crime, but also that *such conviction is not expunged, as it is under various other Minnesota statutes so as to have no legal existence.* In other words, the Court finds that § 609.165 operates to restore certain of a convicted criminal's civil rights as if there had been no conviction, but does not eradicate that conviction as if it had never occurred.
>
> *Therefore, since defendant's burglary conviction was not eradicated, expunged, or set aside by the Court Order which restored his civil rights pursuant to § 609.165, the Court finds that he is still rightfully considered a felon and, thus, is subject to the proscription of § 1202(a)(1).*

United States v. Mostad, Crim. No. 72-144 (D. Minn., filed Dec. 4, 1972), at 5 (footnotes omitted) (emphasis added), *aff'd*, 485 F.2d 199 (8th Cir. 1973).

A major purpose of Minnesota's Youth Conservation Act is the rehabilitation of young persons found delinquent or guilty of crime. M.S.A. § 242.01. It is in furtherance of this purpose that § 242.31 provides that for certain qualifying youthful offenders, the stigma of prior criminal conviction

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[2] *See also* M.S.A. § 609.166 which similarly provides for court ordered "setting aside" of prior felony or gross misdemeanor convictions of certain youthful offenders. The state legislature has expressly provided that:

> Where an order is entered by the court setting aside the conviction the person shall be deemed not to have been previously convicted.

M.S.A. § 609.168.

can be removed. To conclude that the "nullified" and "set aside" conviction can be used against such youth in some way other than the limited manner provided in the statute would serve to defeat its purpose.

The federal criminal statute involved here relies upon a state action to provide an element of the federal offense. The violation of the federal Act in this instance is predicated solely upon defendant's status as a felon convicted in state court. Under M.S.A. § 242.31 the state of Minnesota has effectively nullified its prior action and defendant's previous conviction has been set aside. The federal statute is silent as to the effect of such state action. We conclude that because the state of Minnesota has set aside and nullified defendant's prior state conviction under M.S.A. § 242.31, defendant cannot be classed as a felon at the time of his alleged offense under 18 U.S.C. App. § 1202(a)(1). Therefore, defendant is not amenable to prosecution under that Act. *Cf. United States v. Hoctor*, 487 F.2d 270 (9th Cir. 1973).

The Government also relies upon 18 U.S.C. App. § 1203(2) which provides that the restrictions of the Act do not apply to persons who have received executive pardons which expressly authorize the possession of firearms. But the existence of that "exemption" does not affect the result here. Under M.S.A. § 242.31, defendant has not received a "pardon" in the ordinary sense. Rather, under a statute directed to the rehabilitation of youthful offenders, defendant has received a discharge along with an express nullification or expungement of his past criminal conviction. We find no indication that Congress intended to override the effect of such a state law and state action which results in a prior state felony conviction being nullified and set aside by court order.

It is ordered that defendant's motion to dismiss the indictment herein is GRANTED.

Dated: January 29, 1975.

EDWARD J. DEVITT
Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1121

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ROBERT P. KELLY,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 15, 1975
Filed: June 11, 1975

Before GIBSON, Chief Judge, and HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

Robert P. Kelly was indicted for violation of 18 U.S.C. App. § 1202(a)(1), which prohibits possession of a firearm by one who has previously been convicted of a felony. The District Court dismissed the indictment, holding that Kelly was not

a convicted felon within the meaning of the statute. We reverse.

The parties stipulated that Kelly had been convicted in Minnesota state court in 1970 of the crime of simple robbery, that he had served time in a reformatory pursuant to that conviction, and that, upon his release in August, 1973, he was granted a restoration of civil rights by the Minnesota Department of Corrections Youth Conservation Commission pursuant to Minn. Stat. Ann. § 242.31.[1] They further stipulated, in effect, that all elements of § 1202(a)(1) had been met, with the exception of the disputed convicted felon issue. The District Court held that the restoration of civil rights pursuant to Minn. Stat. Ann. § 242.31 obliterated Kelly's felony conviction for purposes of § 1202(a)(1). We cannot agree.

Congress has expressly exempted from the operation of § 1202(a)(1)

> * * * any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

18 U.S.C. App. § 1203(2).[2]

As was true in *United States v. Mostad*, 485 F.2d 199, 200 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974), "[t]he defendant is not such a person."[3] He was neither pardoned by the Governor nor expressly authorized to possess a firearm. Instead,

> * * * [h]e belongs to a general class of convicted felons whose civil rights have been restored *by a statute* that is silent with respect to the right of such persons to possess firearms. * * *

Id. (Emphasis supplied.).

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[1] Section 242.31 provides:

Whenever a person committed to the authority upon conviction of a crime is discharged from its control other than by expiration of the maximum term of commitment as provided in chapter 242, or by termination of its control under the provisions of section 242.27, such discharge shall, when so ordered by the authority, restore such person to all civil rights and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof. The authority shall file a copy of the order with the district court of the county in which the conviction occurred, whereupon the court shall order the conviction set aside.

Whenever a person has been placed on probation by the court pursuant to section 242.13 and, after satisfactory fulfillment thereof, is discharged therefrom, the court, on application of the defendant or on its own motion and after notice to the county attorney, in its discretion may likewise so order.

Such orders restore the defendant to his civil rights and purge and free him from all penalties and disabilities arising from such conviction and it shall not thereafter be used against him, except in a criminal prosecution for a subsequent offense if otherwise admissible therein.

[2] A felon may apply to the Secretary of the Treasury to have his federal disability removed under 18 U.S.C. §925(c). But §1203 contains the only provisions for exemption stemming from the actions of state, as opposed to federal, authorities. Kelly did not apply for relief under §925(c).

[3] The defendant in *Mostad* had had his civil rights restored pursuant to Minn. Stat. Ann. §609.165, which provides in relevant part:

> Subdivision 1. When a person has been deprived of his civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore him to all his civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.
>
> Subd. 2. The discharge may be:
>
> (1) By order of the court following stay of sentence or stay of execution of sentence; or
>
> (2) By order of the Minnesota corrections authority prior to expiration of sentence; or
>
> (3) Upon expiration of sentence.

Although the statute involved in *Mostad*, unlike the statute involved here, did not speak of "purging" and "nullifying" the conviction, the distinction is not a relevant one for purposes of §1202(a)(1). Neither state rehabilitative program comes within the purview of §1203(2), and the reasoning in *Mostad* is equally applicable here. In *United States v. Glasgow*, 478 F.2d 850 (8th Cir.), *cert. denied*, 414 U.S. 845 (1973), the defendant had pleaded guilty to a felony, yet was classified under state law as a gross demeanant due to his light sentence. We held that he was still a convicted felon for purposes of §1202(a)(1).

By specifically providing that it would recognize only certain pardons, Congress indicated that it did not wish to recognize other means which the states might employ to expunge felony convictions or to restore civil rights. Thus, Congress permitted the arming of those ex-offenders who had been individually considered and approved by a chief executive, but chose not to permit the arming of ex-offenders who receive automatic treatment under general rehabilitation statutes. We have previously held that this classification is a reasonable one, *United States v. Mostad, supra* at 201, and we adhere to that ruling.

Kelly's assertion that the principle of federal-state comity requires recognition of the Minnesota "statutory pardon" is without merit.

> * * * Neither the inherent nature of a pardon nor full faith and credit require that a state pardon automatically relieve federal disabilities.

Thrall v. Wolfe, 503 F.2d 313, 316 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3499 (1975).

The state has no superior interest in arming its citizens.

Although he does not properly present the issue,[4] we are concerned about the danger that state authorities may affirmatively mislead an ex-offender into believing that his right to carry a firearm under federal law has been restored

[4] From the stipulation presented to the District Court and the briefs on appeal, it appears that Kelly chose to rest his case on the technical argument that he was not in fact a convicted felon. He did not argue that he was misled by the state.

by state action.[5] During oral argument in the *Mostad* case, we asked counsel for the State of Minnesota to take steps to insure that ex-offenders rehabilitated under Minn. Stat. Ann. § 609.165 would be affirmatively warned that their federal disabilities concerning firearms had not been removed. Apparently this was done. It is important that the state also assure that this is done in the future with respect to § 242.31 and any other statute providing for the restoration of civil rights.

Reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHT CIRCUIT.

[5] In this instance, the letter which was sent to Kelly by the Department of Corrections in September of 1973 congratulated him on the nullification of his conviction and declared that the state's action

> * * * has the same effect as a pardon in that it generally relieves you of the legal disabilities you incur by your conviction. A copy of this discharge has been filed with * * * the Federal Bureau of Investigation.

It is true that,

> * * * [u]nder §1202(a)(1), the government need not prove specific intent to violate the law or knowledge on the part of the defendant that he is violating the law. * * *

United States v. Mostad, 485 F.2d 199, 200 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974).

Nevertheless, there is a disquieting measure of unfairness when a state agency misleads an ex-offender into believing that he is exempt from a federal law. This unfairness should be corrected.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1974

75-1121

THE UNITED STATES,

Appellant,

vs.

ROBERT P. KELLY,

Appellee.

Appeal from the United States District Court
for the District of Minnesota

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

July 2, 1975.

STIPULATION OF FACTS

"Therefore, it is stipulated by and between counsel and the defendant, undersigned, that the following facts are true and correct: that on or about the 1st day of March, 1974, in the State and District of Minnesota, Robert P. Kelly, the defendant herein, did receive, in and affecting commerce, a firearm, that is, a Colt, Model Commander, caliber .38 super re-

volver: and in more particularity, that on March 1, 1974, Maplewood Police Officer David Arnold arrested Robert P. Kelly in possession of said revolver; and that on or about February 11, 1974, one Terrence L. Peters sold said revolver to Robert P. Kelly for approximately $105.00, in the State of Minnesota; and that on approximately October 10, 1968, said revolver was shipped by Colt Industries, Hartford, Connecticut, to the Great North Trading Post, Anoka, Minnesota; that on or about the 31st day of August, 1970, Robert P. Kelly waived trial by jury and was tried by the Court alone and found guilty of the crime of simple robbery in the District court for the Second Judicial District of the State of Minnesota, in the County of Ramsey; and that on the 13th day of January, 1971, Robert P. Kelly was committed to the Minnesota Youth Conservation Commission according to law and was sentenced to the Minnesota State Reformatory in Sherburne County, at St. Cloud; and that on the 16th day of August, 1973, Robert Peter Kelly was granted an order of discharge and restoration of civil rights by the Minnesota Department of Corrections Youth Conservation Commission, pursuant to M.S.A. Section 242.31; and that copies of said judgment and order of discharge and attached letter of the Minnesota Department of Corrections are made exhibits A, B, and C, hereto; further,

"The defendant, Robert P. Kelly hereby knowingly and intentionally waives his right to a trial by jury and intends that this cause be submitted to the Court upon this stipulation of facts, having been duly informed by his counsel John S. Connolly of the full nature of a trial by jury, and the rights attendant thereto."

(Exhibit A—Setting forth documents establishing the fact of conviction for simple robbery and incarceration in the Minnesota State Reformatory for Men.)

EXHIBIT B

MINNESOTA DEPARTMENT OF CORRECTIONS
YOUTH CONSERVATION COMMISSION
Saint Paul, Minnesota

ORDER OF DISCHARGE AND RESTORATION
OF CIVIL RIGHTS

WHEREAS, Robert Peter Kelly was by the judgment of the District Court in and for the County of Ramsey, State of Minnesota, committed to the Youth Conservation Commission on the 18th day of January, 1971 and has been continuously in the custody of the Youth Conservation Commission since the above date;

Now, THEREFORE, The Youth Conservation Commission does hereby discharge the said Robert Peter Kelly from its control.

IT IS FURTHER ORDERED that, pursuant to the provisions of Minnesota Statutes, Chapter 242, the said Robert Peter Kelly is restored to all civil rights, his conviction set aside and nullified, and he is purged thereof.

By MILTON S. OLSON
Chairman
ELIZABETH PEDERSON
Commission Clerk

Dated August 16, 1973.

I hereby certify that the foregoing order is an exact copy of the original, on file in the office of the Youth Conservation Commission.

MILTON S. OLSON

EXHIBIT C

STATE OF MINNESOTA
DEPARTMENT OF CORRECTIONS
310 State Office Building
Saint Paul, 55155

September 12, 1973

Mr. Robert P. Kelly
760 Bush Street
St. Paul, Minnesota 55106

Dear Mr. Kelly:

Congratulations! The Youth Conservation Commission, having been impressed with your conduct while in their custody and under their supervision, have granted you a discharge.

You will note that this discharge differs from other types of discharges granted by the Commission in that it contains the following language:

> ". . . . such discharge shall, when so ordered by the commission, restore such person to all civil rights and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof. The commission shall file a copy of the order with the district court of the county in which the conviction occurred, whereupon the court shall order the conviction set aside."

This action by the Commission indicates their confidence that you will be of law-abiding conduct. It also has the same effect as a pardon in that it generally relieves you of the legal disabilities you incur by your conviction. A copy of this discharge has been filed with the court in which you were convicted, which court has made an order setting your conviction aside. Copies have also been filed with the State Bureau of Criminal Apprehension and the Federal Bureau of Investigation. These

agencies for all pratical purposes will have sealed your records and will not disclose them to any other person or agency except in subsequent judicial proceedings of a criminal nature.

Again we wish to extend to you our congratulations and best wishes for a law-abiding and productive future.

Sincerely,

.....

242.31 Restoration of civil rights

Whenever a person committed to the commission upon conviction of a crime is discharged from its control other than by expiration of the maximum term of commitment as provided in Minnesota Statutes, Chapter 242, or by termination of its control under the provisions of section 242.27, such discharge shall, when so ordered by the commission, restore such person to all civil rights and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof. The commission shall file a copy of the order with the district court of the county in which the conviction occurred, whereupon the court shall order the conviction set aside.

Whenever a person has been placed on probation by the court pursuant to section 242.13 and, after satisfactory fulfillment thereof, is discharged therefrom, the court, on application of the defendant or on its own motion and after notice to the county attorney, in its discretion may likewise so order.

Such orders restore the defendant to his civil rights and purge and free him from all penalties and disabilities arising from such conviction and it shall not thereafter be used against him, except in a criminal prosection for a subsequent offense if otherwise admissible therein.

Laws 1947, c. 595, § 1. Amended by Laws 1961, c. 59, § 1; Laws 1965, c. 52, § 1, eff. Mar. 4, 1965.

APPENDIX

UNLAWFUL POSSESSION OR RECEIPT OF FIREARMS

Pub. L. 90-351, Title VII, §§ 1201-1203, June 19, 1968, 82 Stat. 236

Sec.

1201. Congressional findings and declaration.
1202. Receipt, possession, or transportation of firearms.
(a) Persons liable; penalties for violations.
(b) Employment; persons liable; penalties for violations.
(c) Definitions.
1203. Exemptions.

§ 1201. Congressional findings and declaration

The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce,

(2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

As amended Pub.L. 90-618, Title III, § 301(a)(1), Oct. 22, 1968, 82 Stat. 1236.

Title 18 Appendix
CRIMES AND CRIMINAL PROCEDURE

§ 1202. Receipt, possession, or transportation of firearms—Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Definitions

(c) As used in this title—

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less;

§ 1203. Exemptions

This title shall not apply to—

(1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and

(2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

Supreme Court, U. S.
FILED
AUG 9 1975
MICHAEL RODAK, JR., CLERK

No. 75-187

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT P. KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the expungement of his prior state felony conviction by a state administrative agency precluded his indictment for possession of a firearm by a convicted felon under 18 U.S.C. App. 1202(a)(1).[1]

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[1] In pertinent part, 18 U.S.C. App. 1202(a) provides:

Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a

The facts are stipulated. (Pet. App. 16-17) On August 31, 1970, petitioner was convicted in a Minnesota court of robbery, a felony. He was committed to the custody of the State Youth Conservation Commission and incarcerated at the Minnesota State Reformatory. On August 16, 1973, the Commission granted petitioner an "order of discharge and restoration of civil rights" pursuant to Minn. Stat. Ann. (1972 ed.) § 242.31 (Pet. App. 17).[2] On March 1, 1974, petitioner was arrested in possession of a firearm which he had received in interstate commerce, and was thereafter indicted in the United States District Court for the District of Minnesota for violation of 18 U.S.C. App. 1202(a). The district court

> felony * * * and who receives, possesses, or transports in commerce * * * any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[2] In pertinent part, Minn. Stat. Ann. (1972 ed.) § 242.31 provides:

> Whenever a person committed to the commission upon conviction of a crime is discharged from its control * * *, such discharge shall, when so ordered by the commission, restore such person to all civil rights and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof. The commission shall file a copy of the order with the district court of the county in which the conviction occurred, whereupon the court shall order the conviction set aside.
>
> * * * Such orders restore the defendant to his civil rights and purge and free him from all penalties and disabilities arising from such conviction and it shall not thereafter be used against him, except in a criminal prosecution for a subsequent offense if otherwise admissible therein.

dismissed the indictment, ruling that "because the state of Minnesota ha[d] set aside and nullified [petitioner's] prior state conviction * * * [petitioner could] not be classed as a felon at the time of his alleged offense under 18 U.S.C. App. § 1202(a)(1)" (Pet. App. 10). On appeal by the United States, the court of appeals reversed, thus allowing reinstatement of the indictment (Pet. App. 11-15).

The judgment of the court of appeals was entered June 11, 1975, and a petition for rehearing and rehearing *en banc* was denied July 2, 1975. The petition for a writ of certiorari was filed on August 2, and is therefore out of time under Rule 22(2) of the Rules of the Court. There is, in any event, no occasion for further review by this Court.

1. There is no merit to petitioner's claim that the state commission's order restoring his civil rights removed his federal disability under 18 U.S.C. App. 1202(a)(1) from receiving or possessing a firearm. Quite apart from the fact that the Minnesota statute permits use of an expunged conviction "in a criminal prosecution for a subsequent offense if otherwise admissible" (p. 2, n. 2, *supra*), the federal statute contains no exceptions for persons whose convictions are expunged under the varying laws of the states. 18 U.S.C. App. 1203(2) exempts from the statute only

> person[s] who ha[ve] been pardoned by the President of the United States or the chief executive of a State and ha[ve] expressly been authorized by the President or such chief executive * * * to receive, possess, or transport in commerce a firearm.

Petitioner has neither been pardoned nor authorized to possess a gun. He "belongs to a general class of convicted felons whose civil rights have been restored by a statute that is silent with respect to" possession of firearms. *United States* v. *Mostad*, 485 F.2d 199, 200 (C.A. 8), certiorari denied, 415 U.S. 947. As the court below, upon whose decision we rely, correctly noted (Pet. App. 14):

> By specifically providing that it would recognize only certain pardons, Congress indicated that it did not wish to recognize other means which the states might employ to expunge felony convictions or to restore civil rights. Thus, Congress permitted the arming of those ex-offenders who had been individually considered and approved by a chief executive, but chose not to permit the arming of ex-offenders who receive automatic treatment under general rehabilitation statutes.

Moreover, Congress may properly accord a state pardon differing effect in differing contexts, for "[n]either the inherent nature of a pardon nor full faith and credit require that a state pardon automatically relieve federal disabilities." *Thrall* v. *Wolfe*, 503 F.2d 313, 316 (C.A. 7), certiorari denied, 420 U.S. 972.[3]

[3] Petitioner also contends that because of the language of the state expungment order, he was not given "fair warning" that he would violate 18 U.S.C. App. 1202(a)(1) by acquiring a firearm (Pet. 5). While the court of appeals discussed the need generally for Minnesota officials to warn discharged persons about their disability under federal law to carry firearms, it expressly noted that petitioner did not raise this issue (Pet. App. 14-15). It should not, therefore, be considered by this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. At all events, there is no merit to petitioner's claim that under the statute the government need prove specific intent to violate the law or knowledge on the part of the accused that he was violating the law. See *United States* v. *Mostad, supra; United States* v. *Wiley*, 478 F.2d 415, 417-418 (C.A. 8), certiorari denied, 419 U.S. 879. Moreover, this is not an issue going to the sufficiency of the indictment.

2. Petitioner also argues (Pet. 4) that the decision below conflicts with *United States* v. *Hoctor*, 487 F. 2d 270 (C.A. 9). There is no present conflict. The *Hoctor* decision concerned the effect of a state expungement statute on a federal prosecution of a former felon who had transported explosives in interstate commerce, in violation of 18 U.S.C. 842(i). Unlike the panel's view of that statute, the prohibition against firearms possession by persons convicted of a felony contains a specific provision (18 U.S.C. App. 1203(2), *supra*) defining the only circumstance when such persons may have a gun. But cf. 18 U.S.C. 845(b). Moreover, the Ninth Circuit is now considering *en banc* an appeal involving a prosecution under 18 U.S.C. App. 1202(a)(1), which will determine its position on the precise issue presented here. *United States* v. *Potts*, C.A. 9, No. 74-1817. If the forthcoming decision of the Ninth Circuit in *Potts* in fact conflicts with the decision below, there will be time enough for petitioner to raise the matter in the event he is convicted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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